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No. 94-1033

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

COMPUTER CURRICULUM CORPORATION,
Petitioner,

v.

INSTRUCTIONAL SYSTEMS, INC., and
DEBORAH T. PORITZ, ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY,
Respondents.

On Petiton for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATE OF NEW HAMPSHIRE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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ISSUE PRESENTED

1. Whether the Third Circuit has misconstrued the analytical principles established by this Court for evaluation of a facially neutral state economic regulation with extraterritorial effect under the federal Commerce Clause in *Pike v. Bruce Church, Inc.*, 307 U.S. 131 (1970) by refusing to consider the effects of New Jersey's Franchise Practices Act on commerce in states outside New Jersey.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Commerce Clause provides that "The Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States." *U.S. Const., Art. I, § 8, cl. 3.*

2. The relevant provision of the New Jersey Franchise Practices Act, *N.J. Stat.* §§ 56:10-1 *et seq.* (1993), is Section 5 of the statute, *N.J. Stat.* § 56:10-5, which provides in pertinent part:

> "It shall be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause. For the purposes of this act, good cause for terminating, cancelling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed on him by the franchise."

INTEREST OF THE AMICUS

The Amicus herein is the Attorney General of the State of New Hampshire. The Attorney General is charged with both common law and statutory power to take legal action in the public interest. The present case concerns the application of a New Jersey statute governing franchise termination which may have the effect of preventing school districts in New Hampshire that have purchased, or may be considering the purchase and installation of the Petitioner's interactive computer learning systems from transacting business directly with Petitioner, a California company.

Specifically, the decision of the Third Circuit to uphold under the federal Commerce Clause provisions of the New Jersey Franchise Practices Act ("NJFPA"), *N.J. Stat.* §56:10-5 (1993), which require Petitioner to renew its distributorship agreement with its New Jersey-based distributor for an indefinite period beyond the expiration of the agreement, may have the result of imposing additional costs and burdens on New Hampshire school systems which may have an interest in acquiring Petitioner's learning systems./1/ The State of New Hampshire believes it to be in

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/1/ The State has been informed that, since 1989, Petitioner has sold, installed and currently provides services related to two interactive learning systems at a high school and junior high school located in Nashua, New Hampshire at a cost to the Nashua school system of approximately $200,000.00. It appears undisputed that no system sales were made in New Hampshire by Instructional Systems, Inc. ("ISI") during the effective period of its distributorship agreement with Petitioner.

the public interest to call such effects of the application of New Jersey law on New Hampshire school districts and their constituent students to the attention of this Court.

In particular, the State of New Hampshire notes that the analytical framework applied by the Third Circuit in upholding the state economic regulation at issue in this case against Commerce Clause challenge failed to include any analysis of the effect of that regulation on commerce within and involving New Hampshire and other states. Because New Hampshire views this failure to examine issues of direct relevance to this and other states as contrary to precedent of this Court and in conflict with the mode of analysis used in the First Circuit to review New Hampshire's own dealership regulation statute under the Commerce Clause, the Attorney General asserts a direct interest in this litigation and urges the Court to grant Petitioner's Writ of Certiorari.

SUMMARY OF ARGUMENT

The State of New Hampshire supports the Petitioner's request that this Court grant a Writ of Certiorari to determine the proper analytic framework for evaluating state economic regulation which has significant extraterritorial effect under the Commerce Clause of the United States Constitution, *U.S. Const., Art I, § 8, cl. 3*, in view of a developing conflict among the Circuits.

This case presents a clear opportunity for this Court to provide guidance to the Circuits regarding the vitality of the balancing test established by *Pike v. Bruce Church, Inc.*, 307 U.S. 131 (1970) for analysis of state economic regulation with extraterritorial effect under the Commerce Clause. The State believes that such guidance is necessary (i) to create uniformity of treatment of state economic regulation under the Commerce Clause and (ii) to ensure that the interests, not only of the state whose regulation is under challenge, but of all states effected by such regulation, are considered in the context of Commerce Clause challenges to state regulation.

The Third Circuit based its ruling that the franchise termination provisions of the New Jersey Franchise Practices Act ("NJFPA"), *N.J. Stat.* §56:10-5 (1993) do not offend the Commerce Clause *solely* on its determination that the statute as written is facially neutral. In doing so, the Third Circuit has misconstrued the analytical principles established by this Court in *Pike v. Bruce Church, Inc.* and reaffirmed in such cases as *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (plurality opinion). Rather, the State believes that the extraterritorial effect of facially neutral state economic regulation such as the NJFPA franchise termination provision is properly evaluated by the balancing of local interests

protected by such regulation against the burden on interstate commerce imposed by the regulation. *Edgar v. MITE Corp.*, 457 U.S. at 643; *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. *See also, CTS Corp. v. Dynamics Corporation of America*, 481 U.S. 69, 94 (1987).

Moreover, had the Third Circuit reviewed the effects on interstate commerce imposed by the NJFPA as applied in this case, it would have been required to note the effect on commerce within New Hampshire and other states in which Petitioner currently does business directly with local school districts. The effect of refusing to review such consequences is to allow the NJFPA's extraterritorial reach to stand without any consideration of the potentially significant economic consequences to New Hampshire's school districts and school children which may result from application of that statute to limit Petitioner's ability to conduct business directly in New Hampshire with New Hampshire citizens.

Finally, precisely these principles have been used in the First Circuit to limit the scope of New Hampshire law regulating the relations between automobile manufacturers and dealers. *New Hampshire Automobile Dealers Association, Inc. v. General Motors Corporation*, 801 F.2d 528, 532 (1st Cir. 1986). Both elementary fairness and the national interest in uniform application of federal law dictate that New Hampshire's citizens should be protected by the Commerce Clause to the same extent and under the same principles as its laws are subject to federal scrutiny. Therefore, this Court should grant Petitioner's request for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF COURTS IN SEVERAL OTHER CIRCUITS CONCERNING THE PRINCIPLES TO BE APPLIED TO COMMERCE CLAUSE ANALYSIS OF THE EXTRATERRITORIAL EFFECT OF FACIALLY NEUTRAL STATE ECONOMIC REGULATION

The State of New Hampshire believes that the Writ should be granted to provide guidance to the Circuits concerning the proper analytic framework for evaluating facially neutral state economic regulation with extraterritorial effect under the Commerce Clause.

It is a fundamental principle of this Court's jurisprudence under the Commerce Clause that state economic regulations may not be applied in a manner that directly regulates commerce outside of its borders. *Healy v. Beer Institute*, 491 U.S. 324, 336-37, (1989); *Edgar v. MITE Corp.*, 457 U.S. at 643; *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). At the same time,

> "not every exercise of state power with some impact on interstate commerce is invalid. 'A state statute must be upheld if it regulates even-handedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental ... unless the burden imposed on such commerce is

clearly excessive in relation to the putative local, benefits.'"

Edgar v. MITE Corp., 457 U.S. at 640, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church*, 397 U.S. at 142.

In effect, these principles dictate that state economic regulations which purport to directly regulate trade or commerce outside the borders of the enacting state are *per se* invalid under the Commerce Clause. *See, e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37 (1980); *City of Philadephia v. New Jersey*, 437 U.S. at 624. However, regulations which are facially non-discriminatory -- i.e., which do not explicitly impose greater burdens on interstate than intrastate commerce -- are subject to the balancing test established by *Pike v. Bruce Church. CTS Corp. v. Dynamics Corp. of America*, 481 U.S. at 94; *Edgar v. MITE Corp.*, 457 U.S. at 640.

This is the rule by which the extraterritorial effect of New Hampshire's statute regulating the relationships between automobile manufacturers and dealers has been analyzed by the First Circuit. *New Hampshire Automobile Dealers Association, Inc. v. General Motors Corp.*, 801 F.2d 528, 532 (1st Cir. 1986) (construing restrictions on differential pricing to exclude sales to rental agency in order to avoid excessive

burden on commerce in other states)[2]; *see also, Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 844 (1st Cir. 1988) (invalidating Massachusetts corporate anti-takeover law under *Pike* test). A similar rule applies in the majority of federal circuits. *See, e.g., Medigen of Kentucky, Inc. v. Public Service Commission*, 985 F.2d 164, 166-67 (4th Cir. 1993); *ANR Pipeline Co. v. Schneidwind*, 801 F.2d 228, 237-38 (6th Cir. 1986), *aff'd* 485 U.S. 293 (1988); *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 283 (8th Cir. 1993); *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 297 (Oct 3, 1994) (No. 94-20); *Dorrance v. McCarthy*, 957 F.2d 761, 764 (10th Cir. 1992); *Diamond Waste, Inc. v. Monroe County*, 939 F. 2d 941, 944-45 (11th Cir. 1991).

In upholding the operation of the NJFPA in this case, the

/2/ In *New Hampshire Automobile Dealers*, Judge Breyer, writing for the Court, upheld the construction of a New Hampshire statute forbidding differentials in manufacturers' pricing to auto dealers as inapplicable to "fleet" sales by General Motors to car rental agencies with limited public sales programs. *Id.* at 532-33. In so ruling, the Court noted that a reading of the statute which applied to such sales could violate the Commerce Clause. The Court cited four factors which supported this position: (i) the statute's potential effect on General Motors prices to "fleet" purchasers outside of New Hampshire; (ii) its potential limitation of access by out-of-state manufacturers to New Hampshire consumers; (iii) its potential limitation of access by New Hampshire consumers to out of state sources of General Motors products; and (iv) the protectionist nature of the statute at issue. *Id.* at 532.

Third Circuit has departed from this traditional analysis. First, the Third Circuit ruled that, because the NJFPA's franchise termination provision is facially neutral, it is not *per se* invalid under the Commerce Clause. However, the Third Circuit then ruled that, in balancing the local benefits of the NJFPA against any incidental burden on interstate commerce under *Pike*, it should examine only the effect of the statute on "interstate commerce," and not on commerce as actually conducted in the several states effected by the franchise termination provision. *Opinion of the Court, Petitioner's Appendix ("Appendix")* 27a:

> "[W]e do not look at the effect of the state regulation on the commerce of other states when we balance [under *Pike*]. Instead ... the only incidental burdens on interstate commerce that implicate the commerce clause ... are those that discriminate against interstate commerce."

Opinion of the Court, Appendix, 27a (Citations omitted). The Court then reasoned that, because the statute was facially neutral and did not overtly discriminate against interstate commerce, it imposed no burden on interstate commerce and would be upheld. *Opinion of the Court*, 28a.[3]

/3/ The State does not support all aspects of the Petitioner's challenge to the reasoning of the Third Circuit. Petitioner would have this Court rule the NJFPA *per se* invalid simply by virtue of its extraterritorial reach. *Petition For Writ of Certiorari ("Petition")*, 9-15. The State does not share in Petitioner's contention that facially neutral state law applied in a manner which has incidental effects on commercial (cont'd)

By so holding, the Third Circuit has, in effect, misapplied the *Pike* balancing test. The Third Circuit's test is deficient in that it imports the traditional test for *per se* invalidity of state law into the *Pike* balancing analysis by suggesting that a facially neutral statute can have no cognizable effect on interstate commerce. *Opinion of the Court, Appendix*, 28a. Adoption of such a standard under *Pike* would have the effect of legitimizing any facially neutral state law which, as applied, would effect commerce in other states, without regard to the effect of such a statute on commercial activity occurring beyond the borders of the enacting state. This result is plainly inconsistent with the policy of promoting a national economy which undergirds this Court's dormant Commerce Clause jurisprudence. *See, e.g. City of Philadelphia v. New Jersey*, 437 U.S. at 624; *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

As applied in this case the NJFPA will directly regulate the terms and conditions by which New Hampshire purchasers may acquire Petitioner's products by forbidding direct marketing of products by the Petitioner to existing or potential school district-buyers in New Hampshire. The mere

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(Footnote 3, cont'd)

activity beyond its borders must be ruled *per se* invalid as so applied. Rather, the State asserts that any such statute is properly measured by the balancing analysis of *Pike* and should be upheld unless it places a clearly excessive burden on interstate commerce in relation to the local benefits conferred. *Pike v. Bruce Church, Inc.*, 397 U.S. at 142.

fact the purchasers in New Hampshire will be required to obtain Petitioner's products through a dealer, presumably at a markup in price, establishes that there is some burden on commerce in New Hampshire effected by the application of the NJFPA. Higher prices for Petitioner's system in New Hampshire could result in greater financial burdens on school systems and their taxpaying residents or in the decision by a school system to forego the expenditure necessary to acquire Petitioner's system.

It is these effects on "commerce of other states" that the Third Circuit should have examined when reviewing the propriety of the NJFPA under the Commerce Clause. *Pike v. Bruce Church, Inc.*, 307 U.S. at 142. By adopting too permissive a test for facially neutral legislation, the Third Circuit has deviated from the precedent of this Court. In addition, the Court ignored the effects that extraterritorial application of the NJFPA may have on the rights of citizens of states other than New Jersey to freely engage in interstate transactions.

By so arguing, the State does not suggest that the mere possibility of incidental market effects occuring beyond a state's border is sufficient to support a challenge to the validity of a state regulation or enactment. *See, e.g., CTS Corp. v. Dynamics Corporation of America,* 481 U.S. at 94. However, where, as here, the effect of a statute is to expressly permit or forbid the conduct of specific transactions between the citizens of states other than the enacting state, then such an effect on commerce outside the enacting state is germane to the question of whether the statute is permissible under *Pike*.

Ordinarily, the question of whether a statute which effectively regulates transactions occurring in commerce

beyond the borders of the enacting state imposes a clearly excessive burden on interstate commerce will be one of fact. Thus, under *Pike*, the Petitioner should have the opportunity to demonstrate that the statute imposes such a burden by demonstrating the necessary effect of applying the statute, as construed, on transactions occurring beyond New Jersey. *See Pike v. Bruce Church, Inc.,* 397 U.S. at 142. By declaring the effects of the NJFPA on commerce in New Hampshire and other states irrelevant to its analysis under *Pike*, the Third Circuit has essentially instructed the District Court on remand to exclude such issues from its factual analysis.

Such a result effectively deprives the citizens of New Hampshire of the benefit of protection under the Commerce Clause. Elementary considerations of fairness, as well as the national interest in uniform application of federal law dictate that New Hampshire's citizens should be accorded the protections of the Commerce Clause under the same principles as are applicable to the consideration of its own laws. *See, New Hampshire Automobile Dealers Association, Inc. v. General Motors Corp.*, 801 F.2d at 532 (1st Cir. 1986). Therefore, the State urges this Court to grant Petitioner's request for a Writ of Certiorari in this matter for the purpose of elucidating the proper analytical standard for evaluating state economic regulation under the Commerce Clause.

CONCLUSION

The Commerce Clause at its most basic level stands for the principle that "our economic unit is the Nation." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 537; *see also, City of Philadelphia v. New Jersey*, 437 U.S. at 624; *New Hampshire Automobile Dealers v. General Motors*, 801 F.2d at 532. This Court and most federal Circuits have established the validity and utility of the balancing test enunciated in *Pike v. Bruce Church, Inc.* for analysis of facially neutral state economic regulation under the Commerce Clause. The analysis adopted by the Third Circuit has essentially repudiated that test, and by doing so, has ignored the effect of the NJFPA on commerce within New Hampshire. The Third Circuit's analysis is also inconsistent with the principles applicable to New Hampshire's own statutory enactments within the First Circuit. Therefore, this Court should grant Petitioner's request for a Writ of Certiorari.

Respectfully Submitted,

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